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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

Petitioners,

VS.

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
Counsel for Petitioners.

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No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED; THE WESTERN SECURITIES COMPANY, EMMA COATS, HENRY E. MYERS, L. DALE DORNEY, FRANCIS D. SCHNACKE, JOHN BURLIN JOHNSON, ROBERT E. COWDEN, FRANK W. NICHOLAS, A. M. ZIMMERMAN, LYDA B. WIGGIM, MARY E. CLUNET, VIRGINIA GOHN, MABEL F. BEANE, CARL W. BEANE, CHARLES A. FORD, SAMANTHA B. HARTER, JOHN WEHRLY, PEARL H. WEHRLY, THE CHAS. SUCHER PACKING COMPANY, J. D. ARTZ, EDWARD T. TURNER AND WELLMORE B. TURNER, AS TRUSTEES UNDER THE WILL OF EARL H. TURNER, DECEASED; JACOB A. ONETH, JAMES M. IRVIN, AS ADMINISTRATOR OF THE ESTATE OF OBED W. IRVIN, DECEASED; MIRIAM MATHIOT BROWN, KATHERINE G. MATHIOT, EMMA M. WEIDENBEIN, GLADYS L. SMITH, ZOLA B. HORRELL, ALICE JANE RUSSUM, JOHN D. WACHMAN, LULU NIXON, EMMA C. CLINE, NELLE DINGLEDINE, LEWIS D. RIEGLE, GEORGIANA DYE MALONE, THEODORE C. DYE, J. L. P. HANNAFORD, ESTELLA K. BUCHE, JESSIE B. RUPP, GEORGE B. ARMSTRONG, HAROLD R. GEB-

HART, CHARLES B. BECKEL, C. H. LOEFFLER, ALBERT J. BERBERICH, ELMER B. HOYLE, WILLIAM D. HARR, MARGARET A. ROSS, as Guardian of John W. Brown, an Incompetent Person; CHARLES A. MILLER, ROBERT F. STOEHR, Jr., PETER W. KLINGER, KARL S. MEUCHE, FLORENCE E. MEUCHE, DELMAR G. UBERSAX, NICHOLAS J. KUNTZ, MRS. WILLIAM LUKASWITZ, Jr., H. C. KEVE, DANIEL NEVINS, as Executor of the Estate of F. C. Gray, Deceased; and ANDREW J. CHRISTOPHER, as Executor of the Estate of Sallie Christopher, Deceased,

Petitioners,

vs.

W. E. BRUSSELBACK and W. I. BELL, STEPHEN D. FORST, EDWARD N. HEINZ, WILLIAM P. HOYT, J. FRANK LYMAN, WILLIAM M. WATSON, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Solicitors for the petitioners, Andrew J. Christopher and others, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on December 15, 1936 (R. 87) (87 F. (2d) 761), reversing the judgment of the District Court of the United States for the Southern District of Ohio, Western Division (R. 72).

A petition for rehearing (R. 93) was filed on January 12, 1937, in said Circuit Court of Appeals, and was denied on March 9, 1937 (R. 99). The full title of this case, showing the names of all defendants, appears in the Bill of Complaint (R. 1).

Statement of Case.

Respondents, as creditors of The Chicago Joint Stock Land Bank, filed a bill in equity to collect the theretofore determined shareholders' double liability assessment against the shareholders of that bank.

The respondents' bill of complaint recites (R. 5) that in October, 1932, a class suit in equity to establish the double liability of the shareholders of The Chicago Joint Stock Land Bank was instituted in the United States District Court for the Northern District of Illinois, at Chicago. In that bill there were named as defendants The Chicago Joint Stock Land Bank and all of its shareholders, exceeding one thousand in number. Service was had on all shareholders residing in Illinois who could be found. No service was attempted upon non-resident shareholders, and none of the Ohio shareholders was served, appeared, or defended.

The bill alleges that the matter was referred to a master, and that his report, which was adopted by the Court, found that the Bank was insolvent to the extent of approximately twelve million dollars ($12,000,000.00) and recommended that an assessment of one hundred per cent (100%) should be levied against all shareholders (R. 5, 32). This levy was made by the Chicago decree (R. 31), dated August 5, 1935.

Subsequently, on August 8, 1935, respondents instituted this present action in the District Court in the Southern District of Ohio against all shareholders resident in Ohio to collect the assessments theretofore determined and levied

in the Chicago decree. Their bill of complaint alleges (R. 5) that said Chicago decree is effective and binding on all of the shareholders of the Bank, wherever residing, and whether of record or otherwise, and that it effectively adjudicates against the defendants named in such bill of complaint that all of the shareholders of the bank are liable to the creditors of the Bank for an assessment equal to one hundred per cent (100%) of the par value of the shares held by them. No allegation as to the insolvency of the Bank or the necessity of making an assessment against its stockholders was contained in the bill.

Petitioners filed a large number of motions to dismiss upon various grounds which may be classified for the purpose of convenience into three principal issues:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity; and

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either at law or in equity; and

3. The bill of complaint does not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00).

The District Court dismissed the bill of complaint (R. 72, 73) on the following grounds:

1. That said bill, as amended, is insufficient to constitute a valid cause of action in equity;

2. That the matter in controversy does not exceed, exclusive of costs and interest, the sum or value of three thousand dollars ($3,000.00); and

3. Upon the grounds raised by all other motions.

Thereafter, the complainants, failing to amend their bill of complaint and treating the decree of the District Court as final, appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 74, *et seq.*). That court reversed the decree of said District Court and remanded the case to said District Court (R. 87). It is this decree of reversal which the petitioners now seek to have reviewed by this Court:

Questions Presented.

1. Whether a bill in equity filed by creditors of a Federal joint stock land bank against holders of shares in such bank to collect a one hundred per cent (100%) assessment of double liability on such shares theretofore made and levied by the United States District Court in the district where such bank is located in an action in which such shareholders were neither served with process, nor appeared or defended, is sufficient to state a good cause of action against such shareholders *when it contains no allegations as to the insolvency of such bank or as to the necessity for such an assessment,* merely alleging that such an assessment is binding on such shareholders?

2. Whether a bill in equity filed by creditors of a Federal joint stock land bank against representatives of estates of deceased persons who at the time of their deaths were owners of shares in such bank to collect a one hundred per cent (100%) assessment of double liability on such shares theretofore made and levied, is sufficient to state a good cause of action against such representatives *when it does not allege presentation of claims for such assessment to such representatives, as required by the local probate laws in the state where such bill is filed?*

Statutes Involved.

The Federal Farm Loan Act (July 17, 1916, C. 245, §16, 39 Stat. 374, 12 U. S. C. A. §812) provides:

> "Shareholders of every joint stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

The provisions of Probate Code of the State of Ohio (G. C. 10509-1, *et seq.*), pertinent to the presentation of claims against decedents' estates, are set forth in the appendix.

Specification of Errors.

The Circuit Court of Appeals erred in refusing to affirm the decree of the District Court dismissing the bill of complaint, on the grounds that:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, because the bill does not allege insolvency of the Bank or necessity for the assessment.

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, against those defendants who are representatives of estates of deceased shareholders, for the reason that said bill does not allege the presentation of the claims for the assessment to such representatives, as required by the General Code of Ohio.

3. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity for the following reasons:

a. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.

b. There is no trust fund involved.

c. This is not a true class suit.

d. A class suit is unnecessary in this case.

e. Multiplicity of suits is not alone sufficient basis for equity jurisdiction, and never by plaintiffs.

4. The bill of complaint, as amended, does not state facts sufficient to show the required jurisdictional amount of in excess of Three Thousand Dollars ($3,000.00), for the following reasons:

a. Andrew J. Christopher owns but seven (7) shares of stock and many of the defendants own less than thirty-one (31) shares, alleged by complainants to have a par value of One Hundred Dollars ($100.00).

b. The defendants who own more than thirty (30) shares of stock each cannot be sued *in this action* for more than their proportionate liability *to these complainants,* which in every instance is less than Three Thousand Dollars ($3,000.00), even when calculated on the basis of a par value of One Hundred Dollars ($100.00) per share.

5. The bill of complaint, as amended, exhibits on its face a misjoinder of defendants, and a misjoinder of causes of action.

6. The bill of complaint, as amended, exhibits on its face a defect of parties plaintiff.

Reasons for Granting the Writ.

1. There is a conflict of decisions between two United States Circuit Courts of Appeals. When this case was before the District Court, motions were filed by some of the Defendants to dismiss the bill of complaint on the grounds that sufficient facts to constitute a good cause of action were not stated in the bill. These motions were sustained by the District Court. On appeal, this decree of dismissal was reversed by the Circuit Court of Appeals for the Sixth Circuit. By so reversing this decree of dismissal, said Circuit Court of Appeals in effect held that the bill of complaint did state sufficient facts to constitute a good cause of action to collect the assessment theretofore levied by the District Court for the Northern District of Illinois, in an action in which the defendant shareholders were neither served with process, nor appeared or defended. In essence, said Circuit Court of Appeals held that a decree of assessment rendered by Illinois District Court is binding and effective upon all shareholders wherever they may reside and whether or not they were served with process, appeared, or defended in that action. This decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Holmberg et al.* v. *Carr*, 86 F. (2d) 727, decided December 7, 1936. This was a suit in equity by creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis to collect from shareholders resident in New York an assessment of double liability on the stock of that bank previously made by a District Court in Minnesota in an action in which said New York stockholders were not served with process. At page 729, the Court says:

> "The bill at bar, as drafted, depends altogether upon what was done in the district court of Minnesota; it does not allege the facts upon which the liability de-

pends, but only their adjudication by that court; hence it can depend only upon the conclusiveness of the assessment there found."

As to the conclusiveness of that assessment, the Court says, at page 730:

"Therefore we hold that the assessment in the district court has no extraterritorial effect, and that the bill should have been dismissed."

2. In the case at bar the Circuit Court of Appeals for the Sixth Circuit has decided an important question of local Ohio law in conflict with applicable Ohio decisions. When this case was before the District Court, motions were filed by some of the defendants to dismiss the bill of complaint on the grounds that sufficient facts to constitute a good cause of action were not stated in the bill. These motions were sustained by the District Court. On appeal this decree of dismissal was reversed by the Circuit Court of Appeals for the Sixth Circuit. By so reversing this decree of dismissal, said Circuit Court of Appeals in effect held that said bill of complaint did state facts sufficient to constitute a good cause of action against those defendants who were representatives of estates of deceased shareholders, even though said bill did not allege presentment of such claims for the assessment to such representatives, as required by the probate statutes of Ohio. In *Beach* v. *Mizner, Ex'r*, 131 O. S. 481, a suit was brought against the executor of an estate to recover on a subscription of stock in a building and loan association. In its opinion, the Court states the question presented as follows:

"The defendant contends that the plaintiff's petition is demurrable because it does not allege that the claim was presented to him as executor within four months after his appointment, as provided by Section 10509-112, General Code (114 Ohio Laws, 320), and contains

no allegation to the effect that the plaintiff obtained leave from the Probate Court to file his claim for allowance, as provided by Section 10509-134, General Code (114 Ohio Laws, 320).

The Supreme Court of Ohio decides the question thus presented as follows, at page 487:

> "Since the plaintiff failed to allege that his claim was presented within four months or later upon leave first obtained from the Probate Court, the judgment of the Court of Appeals (which sustained the demurrer) must be affirmed."

Thus the decision of the Circuit Court of Appeals for the Sixth Circuit, reversing the dismissal by the District Court of the bill of complaint which did not contain the allegations referred to in *Beach* v. *Mizner, Ex'r,* presents a clear conflict with the decision of the Supreme Court of Ohio in that case.

For these reasons it is respectfully submitted that this petition should be granted.

WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
Counsel for Petitioners.

Dated at Dayton, Ohio, May 20th, 1937.

VERIFICATION AND CERTIFICATE OF COUNSEL.

STATE OF OHIO,
County of Montgomery, ss:

Wellmore B. Turner, Roy G. Fitzgerald, Robert E. Cowden, and Howard P. Williamson each for himself, upon oath say that they are attorneys for some of the petitioners in the foregoing petition; that they have read the said petition

and have personal knowledge of the matters and things therein set forth, and believe the same to be true.

Affiants further state that the said petition for certiorari is prepared and filed in the utmost good faith, believing that the same is meritorious, and that said petition is not prepared and presented in order to delay the final opinion and judgment in the case.

WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON.

Sworn to before me and subscribed in my presence this 20th day of May, 1937.

[SEAL.]

LUDWICA RATERMAN,
Notary Public in and for
Montgomery County, Ohio.

My Commission Expires August 2, 1938.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The District Court for the Southern District of Ohio, Western Division, did not deliver a written opinion. The judgment entered in that Court appears at page 72, 73, of the Record of this case.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, to which an appeal was taken, was delivered on December 15, 1936, and is reported in 87 F. (2d) 761. It appears on page 88 of the Record.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, 43 Stat. 939, 28 U. S. C. A. § 347.

The judgment of the Circuit Court of Appeals was entered December 15, 1936 (R. 87). A petition for rehearing was filed January 12, 1937, within the time provided by the rules of the Circuit Court of Appeals (R. 93). The petition for rehearing was denied March 9, 1937 (R. 99).

III.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration on the facts will be made in the course of the argument which follows.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in refusing to affirm the decree of the District Court dismissing the bill of complaint, on the grounds that:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, because the bill does not allege insolvency of the Bank or necessity for the assessment.

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, against those defendants who are representatives of estates of deceased shareholders, for the reason that said bill does not allege the presentation of the claims for the assessment to such representatives, as required by the General Code of Ohio.

3. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity for the following reasons:

a. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.

b. There is no trust fund involved.

c. This is not a true class suit.

d. A class suit is unnecessary in this case.

e. Multiplicity of suits is not alone sufficient basis for equity jurisdiction, and never by plaintiffs.

4. The bill of complaint, as amended, does not state facts sufficient to show the required jurisdictional amount of in

excess of Three Thousand Dollars ($3,000.00), for the following reasons:

a. Andrew J. Christopher owns but seven (7) shares of stock and many of the defendants own less than thirty-one (31) shares, alleged by complainants to have a par value of One Hundred Dollars ($100.00).

b. The defendants who own more than thirty (30) shares of stock each cannot be sued *in this action* for more than their proportionate liability *to these complainants,* which in every instance is less than Three Thousand Dollars ($3,000.00), even when calculated on the basis of a par value of One Hundred Dollars ($100.00) per share.

5. The bill of complaint, as amended, exhibits on its face a misjoinder of defendants, and a misjoinder of causes of action.

6. The bill of complaint, as amended, exhibits on its face a defect of parties plaintiff.

V.

Summary of the Argument.

Point A. The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege the facts necessary to establish the insolvency of the bank and the necessity for the assessment, and relied merely upon the decree of the District Court in Chicago as to those elements.

Point B. The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as to those defendants who represent estates of

deceased shareholders, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege presentation of the claims to such representatives, as required by the statutes and decisions of the State of Ohio.

VI.

ARGUMENT.

Point A.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege the facts necessary to establish the insolvency of the Bank and the necessity for the assessment, and relied merely upon the decree of the District Court in Chicago as to those elements.

It is submitted by counsel for petitioners that there is a clear conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in this case and the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Holmberg et al.* v. *Carr*, 86 F (2d) 727. In the latter case the court held that an assessment levied by a District Court in Minnesota on the shareholders of a Minnesota joint stock land bank is without extraterritorial effect, requiring dismissal of a bill filed by creditors in a Federal court in New York to collect such an assessment against New York shareholders, where the bill does not allege the facts underlying the liability for the assessment. The failure of the complainants in that case to allege the facts upon which the liability for the assessment depended was held by the court to require the dismissal of the bill. The bill in the instant case not only fails to allege those facts as to the basis of the liability, but it expressly alleges

that the complainants are relying upon the decree of the District Court in Chicago as adjudicating those facts and that liability with respect to these Ohio defendants, and the Circuit Court of Appeals refused to dismiss this bill. Thus we have on one hand the Circuit Court of Appeals for the Second Circuit holding that a decree rendered by a district court in one state determining the necessity for, and making an assessment of statutory double liability on joint stock land bank stock has no extraterritorial effect, is not binding on shareholders residing in other states, and may not be made the basis for a bill in equity in another state to collect an assessment so made; and on the other hand we have the Circuit Court of Appeals for the Sixth Circuit refusing to dismiss a bill to collect such an assessment which not only fails to allege the underlying facts regarding the liability, but expressly alleges that such an assessment is binding on shareholders in other states.

It is important that this situation be clarified by having this conflict resolved one way or the other. As is apparent from these two conflicting decisions, both The Chicago Joint Stock Land Bank and the Southern Minnesota Joint Stock Land Bank of Minneapolis have been declared insolvent by the Federal Farm Loan Board and assessments of the statutory double liability have been made by the district courts in the districts in which said two banks are located. The same creditors in this case and the same creditors in the *Carr* case, *supra,* have filed actions of various kinds in other states to collect the assessments so made, and the conflict in decisions noted above has caused great confusion as to the proper method of procedure.

Congress having provided no machinery for the collection of such liability, conflicts have arisen in the federal and state courts involving a multitude of people in a number of states.

Point B.

The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as to those defendants who represent estates of deceased shareholders, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege presentation of the claims to such representatives, as required by the statutes and decisions of the State of Ohio.

The bill of complaint in this case, which was amended to make parties the representatives of estates of deceased shareholders, contains no allegations as to compliance with the provisions of the probate statutes of the State of Ohio with reference to claims against decedents' estates. The pertinent sections of the Ohio General Code are as follows:

> "§ 10509-112. Presentation, allowance and rejection of claims.—Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or reject all claims, except contingent claims, within thirty days after their presentation. Any claims presented after the time herein provided shall not prevail as against *bona fide* purchasers or as against executors and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against *bona fide* distributees. (R. S. § 6109; 38 v. 146, § 99; S. & C. 584; 102 v. 200; 114 v. 320, §1,)"

> "§ 10509-133. Action on rejected claim barred, when. —When a claim against the estate of a deceased person has been presented to the executor or administrator,

and has been rejected by him in whole or in part, but not referred to referees, or if a claim has been allowed by the executor or administrator in whole or in part and thereafter rejected or further reduced by the court, the claimant or person deriving title from him, must commence an action thereon within two months after receipt of actual notice of such rejection or reduction, if the debt or any part of it be then due, or within two months after some part of it becomes due, or be forever barred from maintaining an action thereon; except that, in the event of the death, resignation or removal of such executor or administrator, within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor; and provided that no claimant shall be permitted to bring an independent action on his claim after it has been heard and decided on the merits on exceptions to the schedule of debts filed by him.

"For the puposes of this section the action of a claimant shall be deemed to have been commenced when the petition and praecipe for service of summons on the executor or administrator have been duly filed. (R. S. §6097; 38 v. 146, §90; S. & C. 582; 114 v. 320 (431); 116 v. 385 (400), §1. Eff. Sept. 2, 1935.)"

"§10509-134. Reinstatement of barred claim.—Upon petition filed by a creditor or person deriving title from him, whose claim has not been presented within the time prescribed by law, the probate court, if after notice to all interested parties and hearing, it is of the opinion that justice and equity so require, and that the petitioner is not chargeable with culpable neglect in failing to present his claim within the time so prescribed, may permit petitioner to file his claim for allowance, but such allowance shall not effect any payment or distribution made before the filing of such claim, nor shall it prejudice the rights of creditors whose claims were filed within the time prescribed by law. (114 vs. 320, §1.)"

Construing these sections in the recent case of *Beach* v. *Miener, Ex'r*, 131 O. S. 481, the Supreme Court of Ohio held that a petition against the executor of an estate which did not allege a presentation of the claim to the executor within four months of the date of appointment or later upon leave first obtained from the Probate Court did not state facts sufficient to constitute a good cause of action. The same construction of these statutes was given by an Ohio Court of Appeals in the unreported case of *Holmberg et al.* v. *Third National Bank & Trust Company, Executor, et al.;* which was a suit brought at law against the executor of a deceased shareholder of the Southern Minnesota Joint Stock Land Bank to collect the assessment hereinbefore referred to in connection with *Holmberg et al.* v. *Carr*, 86 F. (2d) 727. The Ohio Court of Appeals said:

> "In our judgment this claim should have been presented to the executor defendant for allowance before this action was instituted.
>
> "If then it is necessary to present such claim for allowance, we approach the next question. Is it necessary to allege in the petition on a claim against an estate that such claim has been presented to the executor for allowance? It is our view that such allegation is necessary and that a failure to so plead makes the petition bad on demurrer as not stating facts sufficient to constitute a cause of action."

In the face of these Ohio decisions construing Ohio statutes, the Circuit Court of Appeals refused to dismiss the bill of complaint in this case which contained none of the allegations essential to state a cause of action against the representatives of estates of deceased shareholders.

That such matters as this are to be exclusively governed by the law of the State is conclusively shown by the recent decision of this Court in the case of *Pufahl, Rec'r*, v. *Estate of Parks*, — U. S. —, 81 L. Ed. 73, in which it was held that

a demand by the receiver of an insolvent national bank against its stockholders for an assessment of statutory double liability, while based on a Federal statute, may be enforced only in conformity to the law of the forum governing the recovery of debts of like nature.

It is of the utmost importance that this Court exercise its discretionary power to review and correct this decision of the Circuit Court of Appeals which so clearly conflicts with the statutes of Ohio and the construction placed thereon by the courts of Ohio. The purpose of the legislature and Courts of Ohio to promote the prompt settlement of decedents' estates is seriously handicapped and hindered by the decision complained of herein.

No argument is here made with respect to the remaining points hereinabove specified as errors. They are, however, believed to be serious errors, and should a writ of certiorari issue pursuant to this petition, counsel for the petitioners wish to have them considered by this Court in making a decision on the merits of this case.

In conclusion, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of Circuit Court of Appeals for the Sixth Circuit should be reversed; and that to such an end a writ of certiorari should be granted and this Court review the decision of the Circuit Court of Appeals for the Sixth Circuit and finally reverse it.

WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
Counsel for Petitioners.

Dated at Dayton, Ohio, May 20th, 1937.

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JAMES & COOLIDGE.
F. N. R. REDFERN.
PAXTON & SEASONGOOD.
MURRAY SMITH.
F. D. SCHNACKE.
WILLIAM H. VODREY.
F. R. HOOVER.
H. N. & H. W. LILLEY.
JAMES E. THOMAS.
GROVER G. BROWN.
MILTON W. BUFFINGTON.
JOSEPH LEMKUHL.
J. C. FULLERTON, JR.
ROY G. FITZGERALD, JR.
ROBT. E. COWDEN, JR.

APPENDIX.

Sections of Ohio General Code pertinent to the presentation of claims against decedents' estates.

"§ 10509-112. Presentation, allowance and rejection of claims.—Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or reject all claims, except contingent claims, within thirty days after their presentation. Any claim presented after the time herein provided shall not prevail as against *bona fide* purchasers or as against executors and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against *bona fide* distributees. (R. S. § 6109; 38 v. 146, § 99; S. & C. 584; 102 v. 200; 114 v. 320, § 1.)".

"§ 10509-133. Action on rejected claim barred, when.—When a claim against the estate of a deceased person has been presented to the executor or administrator, and has been rejected by him in whole or in part, but not referred to referees, or if a claim has been allowed by the executor or administrator in whole or in part and thereafter rejected or further reduced by the court, the claimant or person deriving title from him, must commence an action thereon within two months after receipt of actual notice of such rejection or reduction, if the debt or any part of it be then due, or within two months after some part of it becomes due, or be forever barred from maintaining an action thereon; except that, in the event of the death, resignation or removal of such executor or administrator, within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor; and provided that no claimant shall be permitted to bring an independent action

on his claim after it has been heard and decided on the merits on exceptions to the schedule of debts filed by him.

"For the purposes of this section the action of a claimant shall be deemed to have been commenced when the petition and præcipe for service of summons on the executor or administrator have been duly filed. (R. S. § 6097; 38 v. 146, § 90; S. & C. 582; 114 v. 320 (431); 116 v. 385 (400), § 1. Eff. Sept. 2, 1935.)"

"§ 10509-134. Reinstatement of barred claim.—Upon petition filed by a creditor or person deriving title from him, whose claim has not been presented within the time prescribed by law, the probate court, if after notice to all interested parties and hearing, it is of the opinion that justice and equity so require, and that the petitioner is not chargeable with culpable neglect in failing to present his claim within the time so prescribed, may permit petitioner to file his claim for allowance, but such allowance shall not affect any payment or distribution made before the filing of such claim, nor shall it prejudice the rights of creditors whose claims were filed within the time prescribed by law. (114 v. 320, § 1.)"